

United States District Court
Central District of California

ANTON TOUTOV,
Plaintiff,
v.
CURATIVE LABS INC. et al.,
Defendants.

Case No. 2:23-cv-02913-ODW (ASx)

**ORDER GRANTING PLAINTIFF'S
MOTION TO REMAND [12]**

I. INTRODUCTION

Before the Court is Plaintiff Anton Toutov's Motion to Remand the case to Los Angeles County Superior Court. (Mot. Remand ("Motion" or "Mot."), ECF No. 12.) For the reasons that follow, the Court **GRANTS** Toutov's Motion.¹

II. BACKGROUND

On December 15, 2020, Anton Toutov filed a complaint in federal court against Curative Labs Inc. ("CLI") and Curative Inc. (collectively, "Curative Defendants"), Korva Holdings LLC and Korva Scientific, Inc., and individuals Jonathan Martin and Paul Scott. *See* Compl. at 1, *Toutov v. Curative Labs Inc.*, No. 2:20-cv-11284-ODW (ASx) (C.D. Cal Dec. 15, 2020) ("*Toutov I*"), ECF No. 1. In that complaint, Toutov

¹ Having carefully considered the papers filed in connection with the Motion, the Court deemed the matter appropriate for decision without oral argument. Fed. R. Civ. P. 78; C.D. Cal. L.R. 7-15.

1 asserted four causes of action arising from Toutov's alleged equity stake in CLI.
 2 *Id.* ¶¶ 78–97. Toutov alleged that, in 2019, Defendants Martin and Scott ousted Toutov
 3 from CLI and refused to pay Toutov his share of profits and financial interests. *Id.*
 4 ¶¶ 10, 14.

5 Nearly two years later, Toutov moved to amend his complaint in *Toutov I* to add
 6 a new claim for Violation of California Penal Code section 496, which creates a civil
 7 cause of action for treble damages and attorneys' fees against anyone who is knowingly
 8 in receipt of stolen property. Mot. File First Am. Compl. 1, *Toutov I*, ECF No. 90. This
 9 Court denied Toutov's motion for lack of good cause and for Toutov's own delay in
 10 seeking leave to amend. Order Den. Pl.'s Mot. 5–6, *Toutov I*, ECF No. 130.

11 More than three months later, on March 21, 2023, Toutov initiated this second
 12 action against Martin, Scott, CLI, and Curative Inc. (collectively, "Defendants") in Los
 13 Angeles County Superior Court. (Notice Removal Ex. A ("Compl.") at 1, ECF No. 2.)
 14 Toutov asserts two new causes of action both arising, as in *Toutov I*, from Toutov's
 15 alleged equity stake in CLI: receipt of stolen property in violation of California Penal
 16 Code section 496 and conversion. (*Id.* ¶¶ 62–70.) Defendants Martin and Scott
 17 removed this second action to federal court on the basis of alleged diversity jurisdiction.
 18 (Notice Removal ¶ 2, ECF No. 2.)

19 Toutov now seeks to remand this case back to Superior Court. (*See generally*
 20 Mot.) The Motion is fully briefed. (Opp'n, ECF No. 15; Reply, ECF No. 16.) After
 21 the Court took the Motion under submission, on June 29, 2023, Toutov voluntarily
 22 dismissed the Curative Defendants. (Notice Partial Dismissal, ECF No. 18.)

23 **III. LEGAL STANDARD**

24 Federal courts are courts of limited jurisdiction and possess only that jurisdiction
 25 as authorized by the Constitution and federal statute. *Kokkonen v. Guardian Life Ins.*
 26 *Co. of Am.*, 511 U.S. 375, 377 (1994). Under 28 U.S.C. § 1441(a), a party may remove
 27 a civil action brought in a state court to a district court only if the plaintiff could have
 28 originally filed the action in federal court. Federal district courts have original

1 jurisdiction where an action arises under federal law, or where each plaintiff's
 2 citizenship is diverse from each defendant's citizenship (*i.e.*, diversity is "complete"),
 3 and the amount in controversy exceeds \$75,000. 28 U.S.C. §§ 1331, 1332(a).

4 There is a strong presumption that a court is without jurisdiction until
 5 affirmatively proven otherwise. *See Fifty Assocs. v. Prudential Ins. Co. of Am.*, 446 F.2d
 6 1187, 1190 (9th Cir. 1970). When an action is removed from state court, the removing
 7 party bears the burden of demonstrating that removal is proper. *Gaus v. Miles, Inc.*,
 8 980 F.2d 564, 566 (9th Cir. 1992). Thus, the removal statute is strictly construed and
 9 any doubt about removal is to be resolved in favor of remand. *Id.*

10 IV. DISCUSSION

11 Toutov seeks to remand the case to Los Angeles County Superior Court, asserting
 12 that complete diversity of the parties does not exist. (Mot. 1.) Toutov also contends
 13 that Defendants Martin and Scott, as citizens of California, are not permitted to remove
 14 the action to this federal court. (*Id.*)

15 A. Diversity of Citizenship

16 Toutov argues that the Court does not have subject matter jurisdiction as diversity
 17 of citizenship did not exist at the time of removal. (*Id.* at 4–5.)

18 When an action is removed on the basis of diversity, the requisite diversity must
 19 exist at the time the action is removed to federal court. *Miller v. Grgurich*, 763 F.2d
 20 372, 373 (9th Cir. 1985). If a suit could not be filed in federal court at the time of its
 21 filing, then it "must remain in state court unless a voluntary act of the plaintiff brings
 22 about a change that renders the case removable." *California ex rel. Lungren v. Keating*,
 23 986 F.2d 346, 348 (9th Cir. 1993) (internal quotation marks omitted).

24 Toutov alleges that both he and Curative Inc. are citizens of Texas. (Compl.
 25 ¶¶ 13–14.) This defeats complete diversity of citizenship. *See Lincoln Prop. Co. v.*
 26 *Roche*, 546 U.S. 81, 84 (2005) ("Defendants may remove an action on the basis of
 27 diversity of citizenship if there is complete diversity between all named plaintiffs and
 28 all named defendants . . ."). Martin and Scott do not dispute that Curative Inc.

1 destroyed complete diversity at the time of removal, but they argue that Toutov has
 2 settled his claims with the Curative Defendants and therefore Curative Inc.'s citizenship
 3 should not be considered for diversity jurisdiction. (Notice Removal ¶ 8.) Although
 4 Toutov recently dismissed the Curative Defendants, he had not yet done so when Martin
 5 and Scott removed the case to federal court. At the time of removal, Curative Inc. was
 6 still a properly served and joined defendant, meaning the Court must consider its
 7 citizenship in the jurisdictional analysis. As complete diversity did not exist at the time
 8 of removal, the Court lacks subject matter jurisdiction over this action. *See Miller*,
 9 763 F.2d at 373.

10 Toutov's subsequent voluntary act of dismissing Curative Inc. does not change
 11 the Court's lack of subject matter jurisdiction. Formal dismissal of a nondiverse party
 12 is required before subject matter jurisdiction exists to support removal. *Guerrero v.*
 13 *Gen. Motors Corp.*, 392 F. Supp. 2d 1133, 1135 (N.D. Cal. 2005). Curative Inc. was
 14 thus a nondiverse defendant at the time of removal, destroying subject matter
 15 jurisdiction. *See Tyler v. Am. Optical Corp.*, No. 2:16-cv-02337-JAK (ASx), 2016 WL
 16 1383459 at *5 (C.D. Cal. Apr. 7, 2016) (remanding action because nondiverse
 17 defendant remained a party to the action at the time of removal despite tentative
 18 settlement agreement). Therefore, the requisite diversity of citizenship did not exist at
 19 the time of removal as both Toutov and Curative Inc. were citizens of Texas.²

20 **B. Forum Defendant Rule**

21 Even if the Court possessed diversity jurisdiction over this action, Toutov also
 22 correctly argues that Martin and Scott may not remove to federal court as they are both
 23 citizens of California and subject to the "forum defendant rule." (Mot. 3–4.)

24
 25 ² In the Notice of Removal, Martin and Scott also argue that all Defendants were fraudulently joined.
 26 (Notice Removal ¶ 12.) However, they do not raise a fraudulent joinder argument in opposition to
 27 Toutov's Motion. (See *generally* Opp'n.) The Court thus deems this argument waived. *See Heraldez*
 28 *v. Bayview Loan Servicing, LLC*, No. CV 16-1978-R (DTBx), 2016 WL 10834101, at *2 (C.D. Cal.
 Dec. 15, 2016) ("Failure to oppose constitutes a waiver or abandonment of the issue." (citing *Stichting*
Pensioenfond ABP v. Countrywide Fin. Corp., 80 F. Supp. 2d 1125, 1132 (C.D. Cal. 2011))), *aff'd*,
 719 F. App'x 663 (9th Cir. 2018).

1 Section 1441(b)(2), referred to as the “forum defendant rule,” “restricts a
2 defendant’s ability to remove a case to federal court.” *Dechow v. Gilead Scis., Inc.*,
3 358 F. Supp. 3d 1051, 1054 (C.D. Cal. 2019). Under the “forum defendant rule,” “[a]
4 civil action otherwise removable solely on the basis of [diversity] jurisdiction . . . may
5 not be removed if any of the parties in interest properly joined and served as defendants
6 is a citizen of the State in which such action is brought.” 28 U.S.C. § 1441(b)(2). Thus,
7 the forum defendant rule “confines removal on the basis of diversity jurisdiction to
8 instances where no defendant is a citizen of the forum state.” *Lively v. Wild Oats Mkts.,*
9 *Inc.*, 456 F.3d 933, 939 (9th Cir. 2006).

10 Both Martin and Scott concede that they there are citizens of California. (Notice
11 Removal ¶ 7.) Toutov filed this case in a California state court. (Compl.) Thus, Martin
12 and Scott are citizens of the forum state and may not remove to this federal court.
13 *Dechow*, 358 F. Supp. 3d at 1054 (stating that § 1441(b)(2) is “unambiguous” and “[i]ts
14 plain meaning precludes removal on the basis of in-state citizenship . . . when the
15 defendant has been properly joined and served”). For this reason as well, Martin and
16 Scott’s removal was improper.

17 V. CONCLUSION

18 For the foregoing reasons, the Court **GRANTS** Plaintiff’s Motion to Remand.
19 (ECF No. 12.) The Court **REMANDS** the case to the Superior Court of California,
20 County of Los Angeles, 111 North Hill Street, Los Angeles, CA 90012, Case
21 No. 23STCV06271.

22
23 **IT IS SO ORDERED.**

24
25 August 11, 2023

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OTIS D. WRIGHT, II
UNITED STATES DISTRICT JUDGE